



State Water Resources Control Board .



Terry Tamminen
*Secretary for
Environmental
Protection*

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Dear Mr. Torgersen and Mr. Bowling:

WATER LEVEL RESPONSE PLAN REQUIRED FOR USE OF JOINT POINTS OF DIVERSION

This letter responds to your letter dated June 24, 2004 submitting the Water Level Response Plan (Plan) required by State Water Resources Control Board (SWRCB) Decision 1641 (D-1641) to me for approval. In D-1641, the SWRCB conditioned its approval of the Department of Water Resources' (DWR) and U.S. Bureau of Reclamation's (USBR) use of each other's points of diversion in the Delta (referred to as Joint Point of Diversion (JPOD)) on several requirements to protect water levels, water quality, the environment, and other public trust resources. DWR and USBR submitted the Plan in compliance with Conditions 1(a)(3) and 2(a)(3) of D-1641 (pages 150 and 155) which requires DWR and USBR to prepare a response plan to ensure that water levels in the southern Delta are not lowered to a point where local agricultural diversions are impaired by use of JPOD. DWR and USBR are authorized to conduct JPOD operations under specified conditions after the Executive Director of the SWRCB and the Chief of the Division of Water Rights (Division) has approved all required submittals, including the water level response plan. Once approved, DWR and USBR are required to implement the Plan during JPOD operations or when otherwise specified by the SWRCB (typically during cross-Delta water transfers).

The Plan submitted on June 24, 2004 replaces the plan submitted on June 25, 2003, which expired on February 29, 2004. The Plan currently under consideration is intended to be a long-term plan to address water level concerns in the southern Delta related to Stage 1 and Stage 2 JPOD diversions. Under Stage 1 JPOD, DWR and USBR are authorized to use each other's pumping facilities to recover export reduction taken to benefit fish and USBR is authorized to utilize DWR's Banks Pumping Plant to make deliveries to serve the Cross Valley Canal contractors and Musco Olive and to support a recirculation feasibility study. Pursuant to Stage 2,

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DWR and USBR are authorized to divert water at each other's pumping facilities for any authorized purpose included in their respective water rights. Stage 2 diversions by USBR at the Banks Pumping Plant are limited to a rate of approximately 8,500 cubic feet per second (cfs). Diversions by DWR at the Tracy Pumping Plant are limited to 4,600 cfs under all stages.

Prior to submission of the final Plan, DWR and USBR submitted a draft of the Plan to SWRCB staff and South Delta Water Agency (SDWA). SDWA submitted comments via email dated May 17, 2004 on the draft Plan to DWR and USBR. Included with the Plan submitted on June 24, 2004 is a response to SDWA's May 17, 2004 comments. In response to some of SDWA's suggestions, DWR and USBR made changes to the Plan. However, DWR and USBR did not incorporate all of SDWA's suggested changes. As a result, SDWA submitted additional comments on the final June 24, 2004 Plan to the SWRCB by letter dated June 30, 2004. Following is a discussion of the issues raised in SDWA's letter.

1. In its email of May 17, 2004, SDWA requested that the statement that the Plan is intended to address water level concerns related to impacts incurred during low tide (included in paragraph 3 on page 1) be removed because water level concerns may also occur during high tide. DWR/USBR responded that modeling of JPOD is intended to determine the incremental impact of JPOD on water levels at low tide and that DWR and USBR are working with SDWA to protect SDWA when JPOD impacts occur at times other than low tide. SDWA responded in its letter of June 30, 2004 that it believes that DWR and USBR will monitor JPOD effects on high tides and barrier operations and therefore SDWA does not object to the provision.

SWRCB Response: If there is any future disagreement regarding this issue, DWR/USBR and SDWA should contact the Chief of the Division for a final determination of required protection.

2. SDWA states that a condition should be added to paragraph 2 on page 2 describing the conditions under which JPOD diversions are presumed not to cause or aggravate water levels of concern. SDWA requests that a condition be added that states that "adequate mitigation (as described below) is provided for diverters downstream of the tidal barriers as necessary," in order to clarify that water level concerns downstream of the barriers do exist, but are being addressed. DWR/USBR responded that the condition is not necessary because the conditions described in this section are intended to describe conditions that do not cause or aggravate water levels of concern and that mitigation measures that address potential water level concerns are addressed in another section of the Plan.

SWRCB Response: Because adequate mitigation for water levels of concern downstream of the tidal barriers is necessary to ensure that there will be no adverse effects of JPOD operations on water levels, I am requiring that the condition requested by SDWA be included in the Plan.

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3. In its email SDWA provided comments regarding paragraph (c) of Condition 2 on page 2 regarding the statement that DWR and USBR will contact parties who may potentially be impacted by low water levels prior to JPOD diversions to ensure that those diverters do not have any plans for diversion during the period in which the JPOD diversions will occur. SDWA stated that it was impractical to contact all potentially affected parties. DWR and USBR responded that they will make their best effort to contact the potentially affected parties. SDWA responded in its subsequent letter that this statement was acceptable provided that "best efforts" is not the measure of compliance for the condition.

SWRCB Response: Based on SDWA's concerns, I am requiring DWR and USBR to maintain a list of southern Delta water users who may be potentially affected by low water levels as the result of JPOD operations. DWR and USBR are required to contact these water users prior to JPOD diversions as specified in the Plan.

4. SDWA's email states that in conformance with the Plan approved last year, DWR and USBR should be required to implement a dredging program prior to authorization of JPOD. DWR/USBR responded that the Plan does not propose that JPOD should be allowed before dredging takes place.

SWRCB Response: In conformance with SWRCB Order WRO 2002-003 and as required in my approval of the Plan last year, no JPOD diversions are authorized pursuant to this Plan until arrangements for dredging of specified southern Delta channels is complete. SWRCB staff understands that the period in which dredging is allowed due to fisheries concerns may vary and there are certain JPOD activities that may be necessary before actual dredging begins. As a result, JPOD diversions pursuant to this Plan will be authorized for a period of two weeks once the necessary permits are obtained and contractual arrangements and financing are in place to begin dredging. After the two-week period, no additional JPOD activities are authorized until dredging is physically in progress and is being pursued expeditiously. In addition, prior to June 1, 2005, DWR and USBR are required to submit a plan for approval by the Chief of the Division to address future dredging needs in the Delta related to JPOD diversions. After June 1, 2005, no JPOD diversions will be authorized pursuant to this Plan until a long-term dredging program has been developed by DWR and USBR and approved by the Chief of the Division. As noted in my letter of July 14, 2004, this condition does not apply to JPOD diversions related to recovering export reductions taken by USBR as a result of the June 3, 2004 Jones Tract levee breach.

5. SDWA stated in its email that any adverse impacts to water quality from JPOD should be mitigated. DWR/USBR responded that water quality issues are outside of the scope of the water level response plan. SDWA responded in its letter that since D-1641 also

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requires a water quality response plan, DWR and USBR should evaluate and mitigate or avoid the effects of JPOD on southern Delta water quality.

SWRCB Response: D-1641 requires DWR and USBR to develop a response plan to ensure that water quality in the southern and central Delta will not be significantly degraded through operations of JPOD to the injury of water users in the south and central Delta. The water quality response plan is required to be prepared with input from Contra Costa Water District and approved by the Chief of the Division. Division staff is currently reviewing the Water Quality Response Plan submitted by DWR and USBR by letter dated July 1, 2004. The Division Chief will determine what conditions if any are necessary to protect water quality for southern Delta diverters during review of the Water Quality Response Plan. SDWA will be notified of any actions taken regarding approval of that plan. SDWA will then have an opportunity to petition for reconsideration by the SWRCB if SDWA believes that the water quality protections provided by any approved plan are not adequate to protect southern Delta water quality from the impacts of JPOD.

6. SDWA comments that if approved, the current Plan should be effective for no more than one year due to "the history of violations, adverse impacts to Delta diverters, and difficulties in accurately predicting harm."

SWRCB Response: Subject to terms and conditions included in the Plan and this letter, I am approving the current Plan until such time as the SWRCB has information that indicates that the Plan should be revised. In order to make changes to the Plan as necessary, I am retaining continuing authority over the Plan to protect southern Delta water levels from the incremental impacts of JPOD diversions, including continuing authority to require changes in the Plan when necessary. In addition, if SDWA believes that its members are being impacted by operations of DWR and/or USBR, SDWA or its members may file a complaint with the Division.

In addition to the issues discussed above, SDWA states that while it believes the Plan (with suggested changes) is a reasonable attempt to address incremental effects of JPOD on water levels, SDWA is still opposed to JPOD diversions and the Plan. SDWA states that SDWA members continue to experience water quality and water level problems and that forecasting is inadequate to predict these problems. SDWA further states that because DWR and USBR are unable to predict the effects of normal export operations, it is impossible to distinguish between normal operations and JPOD operations and thus not possible to avoid adverse effects.

SWRCB Response: In order to determine the effectiveness of the Plan in addressing water level concerns in the south Delta, I am requiring DWR/USBR to prepare a report by August 15, 2005, detailing the effects of JPOD operations pursuant to the current Plan on water levels in the south Delta. Based on the information obtained from the report, I will determine what if any changes may need to be made to my approval of the Plan.

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In summary, based on my review of the proposed Plan and SDWA's comments, I approve the June 24, 2004 Plan for Stages 1 and 2 of JPOD subject to the following conditions:

- A. DWR and USBR shall meet all of the commitments stated in the Plan dated June 24, 2004 as specified in this approval of the Plan. The commitments in the Plan include, among others, a commitment by DWR and USBR to provide forecasts of modeled water levels prior to JPOD diversions and to work in good faith with local diverters and SDWA to provide portable pumps or suspend JPOD operations when water levels of concern are experienced. In addition, DWR and USBR shall commit to conduct JPOD operations pursuant to Condition II(c) in the Plan, which requires DWR or USBR to contact potentially affected diverters prior to diverting water pursuant to JPOD to ensure that the water users have no plans for diversions during the period of the proposed JPOD diversion. DWR or USBR shall promptly demonstrate to both the Chief of the Division and SDWA that it communicated with the potentially affected diverters prior to JPOD diversions, and that the diverters confirmed that they had no plans to divert during the planned JPOD diversion. DWR and USBR shall maintain a list of southern Delta water users who may be potentially affected by low water levels as the result of JPOD operations. As conditions warrant and as requested by SDWA, additional parties shall be added to that list and notified as necessary.
- B. The following condition shall be included as paragraph (d) under Condition II of the Plan:
 - d) *Adequate mitigation (as described below) is provided for diverters downstream of the tidal barriers as necessary.*
- C. With the permission of the agricultural water right holders involved, DWR and USBR shall implement modifications to agricultural diversion structures in the southern Delta or shall implement operational changes needed to protect agricultural diversions in the southern Delta if the diverters experience or are likely to experience low water levels due to the incremental impacts of JPOD operations. Modifications may include changes in the intake structures that will facilitate agricultural diversions from shallow water. If the modifications are shown to alleviate the lower water levels, DWR and USBR may continue with JPOD operations. After implementing these modifications, DWR or USBR may request that the diverters demonstrate to the satisfaction of the Chief of the Division that they have a valid right to the water during the period when low water levels are experienced. DWR and USBR will not be required to perform subsequent modifications or maintenance of the modifications at a diversion structure if the diverter fails to demonstrate the existence of a valid water right.

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- D. In addition to financing and contractual arrangements, DWR and USBR shall diligently and expeditiously pursue approval of dredging permits and certifications from the U.S. Army Corps of Engineers and the Central Valley Regional Water Quality Control Board so that dredging may commence as soon as possible. The purpose of such dredging shall be to ensure that agricultural water diverters have adequate water depths at their points of diversion to divert water during JPOD operations. DWR and USBR shall notify the Chief of the Division upon receipt of the permits and shall submit information that demonstrates that financing is in place and that there is a contract for the dredging. Upon submission of this information and compliance with all of the other conditions of the Plan and D-1641, DWR and USBR are authorized to utilize JPOD for a period of two weeks. After two weeks, JPOD activities are only authorized if dredging is physically in progress and is being pursued expeditiously.
- E. Prior to June 1, 2005, DWR and USBR shall submit a dredging program for approval by the Chief of the Division to address future dredging needs in the southern Delta related to JPOD diversions. After June 1, 2005, no JPOD diversions will be authorized pursuant to this Plan until a long-term dredging program has been developed by DWR and USBR and approved by the Chief of the Division.
- F. In order to determine the effectiveness of the Plan in addressing water level concerns in the south Delta, DWR and USBR in cooperation with SDWA shall prepare a report by August 15, 2005 detailing the effects of JPOD operations pursuant to the current Plan on water levels in the south Delta. The report shall detail any preventive measures that were taken to avoid water level concerns. It shall further indicate what if any water level concerns were encountered during JPOD operations, whether those water level concerns were the result of JPOD operations (from both DWR/USBR's perspective and SDWA's perspective), what actions were taken to address those problems, and the effectiveness of the response. The report shall include a detailed description of the characteristics and effects of operations without JPOD, adequate to demonstrate the difference between operations with JPOD and without JPOD.
- G. This approval is based on the continuation of the facilities, Clifton Court Forebay (CCF) operational criteria, and regulatory restrictions on exports that exist as of July 20, 2004. If facilities, CCF operations or export restrictions change, then the DWR and the USBR shall consult with the Chief of the Division to determine whether the Plan requires changes and further approval.
- H. I retain continuing authority over my approval of the Plan for the purpose of requiring changes as needed to meet the conditions in the water rights of DWR

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and USBR on use of the JPOD and to protect the public welfare, protect public trust uses, and prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of the water involved.

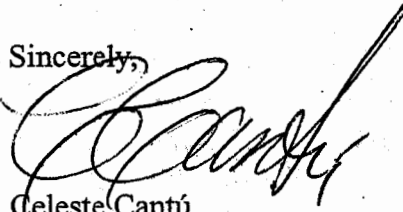
With the above conditions, the proposed Plan meets the requirements of D-1641 and is approved, subject to DWR and USBR meeting the above conditions and the commitments in the Plan.

If any interested party objects to my decision, the interested party may submit a petition for reconsideration in accordance with Sections 768 and 769 of Title 23 of the California Code of Regulations. A petition for reconsideration must be submitted in writing within 30 days from the date of this letter to:

Arthur G. Baggett, Jr., Chair
State Water Resources Control Board
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Sacramento, CA 95812-0100

If you have any questions regarding this matter, please contact Diane Riddle, Environmental Scientist, at (916) 341-5297, or Barbara Leidigh, Staff Counsel IV, at (916) 341-5190.

Sincerely,



Celeste Cantú
Executive Director

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